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# Supreme Court of the United States

ANGELA KHOROZIAN,

*Petitioner,*

– against –

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the bank fraud statute (18 U.S.C. § 1344), which makes illegal a scheme to defraud a bank, requires a specific intent to cause a bank an actual or potential loss of its own funds — or, is it sufficient to merely establish the commission of an act that "*could*" put a bank at risk of loss, without any specific intent to harm the bank.[1]

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[1] The Solicitor General concedes that the circuits are split on this constitutional question. A similar petition for certiorari, involving the identical issue, is also currently pending in this Court. *See McNeil v. United States*, No. 02-10904 (scheduled for conference on September 29, 2003).

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Petitioner Angela Khorozian respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding. The opinion was filed on June 20, 2003, and amended on August 25, 2003.

## OPINIONS AND ORDERS BELOW

(1) The opinion of the Third Circuit, dated June 20, 2003, affirming Petitioner's conviction for bank fraud is reprinted in the Appendix hereto, App. 1-19.

(2) The order, dated July 22, 2003, denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *en Banc* is reprinted at App. 21-22.

(3) Two months after the Third Circuit affirmed Petitioner's conviction, the court, *sua sponte*, amended its opinion. The amended decision, dated August 25, 2003, is reported at *United States v. Khorozian*, 333 F.3d 498 (3d Cir. 2003). The order amending the Slip Opinion is reprinted at App. 23-27.

(4) On August 14, 2003, the Third Circuit granted Petitioner's motion to stay the issuance of the mandate pending a Petition for a Writ of Certiorari. That order is reprinted at App. 29.

## JURISDICTION

The opinion and judgment of the Third Circuit were filed on June 20, 2003. A Petition for Rehearing and Suggestion for Rehearing *en Banc* was denied by the Third Circuit on July 22, 2003. The 90-day period for

filing this petition for certiorari expires on October 20, 2003.[1] *See* Rules 13.1 and 30.1. The jurisdiction of this Court to review the ruling of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 1344, entitled Bank Fraud, provides as follows:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice —
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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[1] The judgment of the Third Circuit was substantially amended on August 25, 2003, by a precedential order. Therefore, the period for filing this petition may, arguably, expire on November 24, 2003.

## STATEMENT OF THE CASE

Petitioner Angela Khorozian is a 51-year-old mother of three who has no prior criminal history. In May of 2000, in connection with an investment opportunity, a longtime friend, Eduardo Queirolo, the owner of a large sugar refining operation in Brazil, obtained two checks that he wanted deposited in the United States. The checks came from reliable American corporations[2] and were made payable to a third party (C.A. Supp. App. 61). In order to be certain that there was nothing wrong with the checks, Queirolo traveled from Brazil to Uruguay to assure himself that the funds were not derived from arms trafficking, drugs, or any other kind of major crime (C.A. Supp. App. 52, 63).

Queirolo also had an acquaintance, who managed a large currency exchange in Uruguay, with branches in New York, investigate the checks to make sure that they were legitimate (C.A. Supp. App. 53). The exchange manager faxed the checks back to Queirolo and, written in the margin, was an indication that the companies were "good," that they "had funds," and the numbers of the checks were "correct" (C.A. Supp. App. 53).

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[2] One check was from Costco Wholesale Corporation ("Costco") for $9,652,345.25 (C.A. Supp. App. 19). Costco announced net sales of $31.62 billion for the 2000 fiscal year. *See Costco Wholesale Corporation Releases Fourth Quarter and Fiscal Year 2000 Results of Operation*, Business Wire (Oct. 12, 2000), available at *http://www.Costco.com* (visited Jan. 8, 2003). The second check was from Liberty Carton Company, in Minnesota, for $10,746,527.50 (C.A. Supp. App. 18).

**Petitioner Did Not Know that the Checks Were Counterfeit**

At the end of May, Queirolo brought the checks to the United States. Prior to his arrival, Angela Khorozian had opened a corporate account at Hudson United Bank in New Jersey.[3] When Queirolo arrived from Brazil they deposited the checks, which they both believed were "perfectly good," in the account (C.A. Supp. App. 62).[4] Thereafter, the bank discovered that the checks, which appeared to be genuine on their face, were counterfeit. Even though Petitioner and Queirolo were unaware that the checks were counterfeit, they were both arrested.

The government initially alleged that the Defendants knew that the checks were counterfeit. However, after further investigation, the indictment was subsequently superseded to remove any claim that either Queirolo or Petitioner knew of the counterfeit nature of the checks (C.A. App. 20). Instead, the superseding indictment alleged a scheme to defraud by the use of fraudulent

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[3] The account was in the name of a company that she had once formed for investment purposes. Petitioner engaged a certified public accountant, who was a member of the bank's advisory board, to activate the dormant company and make it ready for business (C.A. App. 313).

[4] Although he made certain that the checks did not relate to the proceeds of any illegal conduct, Queirolo did believe that the checks represented money for which taxes had not been paid in Brazil (C.A. Supp. App. 62). However, failure to pay taxes in a foreign country does not constitute an offense in the United States (C.A. Supp. App. 81).

misrepresentations to induce the bank to pay out the proceeds of the checks to obtain substantial commissions for negotiating the checks (C.A. App. 21).[5]

**None of the Alleged Misrepresentations Made to the Bank Caused Any Harm**

The misrepresentations alleged in the indictment were that Petitioner (1) failed to disclose that her company's corporate status had been revoked by the State of New Jersey for failure to file annual reports; (2) represented that she expected the funds to be wired but, instead, they were actually received by check; (3) presented Queirolo to the bank representative as Luiz Carlos Teixeira; and (4) indicated that the proceeds of the checks were to be invested in a sugar plantation in Africa (C.A. App. 22-23).

However, the defense argued the immateriality of the statements. For instance, it made no difference to the bank's financial integrity if the funds were to be used for the development of a hotel rather than a sugar plantation.[6] Even the trial judge recognized that *what* Angela Khorozian intended to do with the money could *not* be a material misrepresentation to the bank (C.A. Supp. App. 82-83). Moreover, any statement concerning the legal status of the corporation was immaterial because New Jersey law specifically provides that an entity, which has lost its corporate status, because of a failure to file annual reports, can have its certificate

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[5] Petitioner was charged with one count of bank fraud, in violation of 18 U.S.C. § 1344, and one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371 (C.A. App. 20).

[6] There is compelling proof that Petitioner was working with a development project to obtain funding to build a hotel in the African Republic of Chad (C.A. Supp. App. 137; C.A. App. 315-19).

of incorporation *reinstated*. The reinstatement is retroactive and validates all actions taken in the interim.[7]

Also, any suggestion that the funds would be sent by wire, without knowledge that the checks were counterfeit, could not harm the bank. While a statement concerning how the funds would be received might bear on the bank's initial decision to open the account, it would not influence the bank's ultimate decision to accept the checks. A bank is not exposed to loss through the mere opening of an account. It is only when the bank accepts and processes a defective check that it is placed at risk. Simply put, none of the misrepresentations ever put the bank at risk of any economic loss.

**The District Judge Made a Conclusive Finding that There was No Evidence that Petitioner Knew the Checks were Counterfeit**

At Petitioner's trial, the defense argued that since neither defendant knew that the checks were counterfeit, and both believed that the checks were supported by adequate funds, there was no scheme to defraud the bank because they intended it no harm. Significantly, Queirolo — who was the cooperating witness for the government — testified that he never intended to defraud the bank by depositing what he believed to be *bona fide* checks (C.A. Supp. App. 62, 77).

In light of Queirolo's uncontested testimony, the district judge made a specific finding, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, that there was *no evidence* from which the jury could conclude

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[7] N.J.S.A. 14A:4-5(7).

that Angela Khorozian knew the checks were counterfeit (C.A. Supp. App. 83). In the face of the court's conclusive finding, the prosecutor argued to the jury that the question of Petitioner's intent was "*[n]ot* whether she thought the checks were good or not, but whether she engaged in fraudulent misrepresentations to the bank" (C.A. Supp. App. 251) (emphasis supplied).[8] Thus, the case was presented on the theory that false representations were made to the bank, rather than any claim that Petitioner *knowingly* presented counterfeit checks for deposit with an intent to cause the bank any financial harm (C.A. App. 222).

The district judge instructed the jury that "the government may meet its burden to prove intent through evidence that the defendant made a material misstatement of fact with reckless disregard for the truth" (App. 16). The court also charged the jury that a "scheme or artifice to defraud may be found where there has been a departure from basic honesty, fair play and candid dealings" (C.A. App. 223, 224, 229). Petitioner complained that this emasculated the specific intent required under § 1344.

The jury deliberated for two days before finding Petitioner guilty of bank fraud and conspiracy to commit bank fraud. On June 26, 2002, the district judge sentenced her to an 18-month term of imprisonment.[9]

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[8] The government later argued in the Third Circuit that "a conviction under the bank fraud statute does not require that Khorozian knew that the checks were invalid, only that she made material representations to the bank that put it at risk of loss" (App. 7-8).

[9] The district court granted Petitioner bail pending appeal and the Third Circuit stayed the issuance of its mandate pending this petition (App. 29).

On June 20, 2003, the Third Circuit affirmed Angela Khorozian's conviction. In a published decision, the court held that the specific intent requirement of § 1344 is "satisfied if an individual commits an act that *could* put the bank at risk of loss" and that Petitioner's "actions" or misrepresentations *could* have put the bank at risk (App. 9-10).[10] The court also concluded that the judge's jury instructions were proper (App. 15-17).

The panel then rejected Petitioner's due process claim regarding the district judge's refusal to introduce into evidence a contract that had been faxed to a witness in Africa, which would have confirmed (1) the investment opportunity and (2) the fact that Petitioner and the payee of the checks, Teixeira, had a commercial relationship *before* the checks were brought to the United States (App. 12-14). However, the court subsequently amended this aspect of its decision and held that the district judge was "mistaken" in excluding the fax but those errors were "harmless" (App. 23-27).

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[10] In addition, the court held that the jury could have found that Petitioner was "willfully blind" to the fact that the checks were counterfeit and that willful blindness constitutes "sufficient fraudulent intent under § 1344" (App. 8-9). The defense objected to the willful blindness instruction and argued that where there is *no evidence* of knowledge of the checks' invalidity, as demonstrated by the trial judge's *finding* that there was no proof that Petitioner knew that the checks were counterfeit, willful blindness can never be used to satisfy such a failure of proof. Moreover, the doctrine of willful blindness cannot be used to supply evidence of a specific intent under § 1344.

## REASONS FOR GRANTING CERTIORARI

The presiding question presented by this petition, which is of exceptional importance, concerns the scope of the bank fraud statute (18 U.S.C. § 1344) and whether it requires a specific intent to cause a bank an actual or potential loss of its funds. Or, whether the mere commission of an act "that *could* put the bank at risk of loss" is sufficient to sustain a conviction under § 1344. This issue has created a clear conflict among the circuit courts that is a matter of growing constitutional concern. Even the Solicitor General agrees that the circuits are *divided* on this crucial question. Moreover, there is now pending before the Court a similar petition for certiorari, from the Ninth Circuit, that presents this identical issue.[11] Thus, there is an urgent need for this Court's intervention to resolve the conflicts among the circuits concerning the proper administration of the bank fraud statute.

### 1. In a Similar Case Now Pending on Certiorari Before this Court (02-10904) the Solicitor General Concedes That There Is a Split in the Circuit Courts Concerning the Specific Intent Necessary to Constitute Bank Fraud

The First Circuit, sitting *en banc*, recently observed that "there are no Supreme Court precedents that define the intent necessary for a bank fraud conviction," and that there is "no consensus among the circuits on the issue."[12] The Solicitor General also agrees that

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[11] *See McNeil v. United States*, No. 02-10904. The *McNeil* Petition is scheduled to be conferenced on September 29, 2003.

[12] *United States v. Kenrick*, 221 F.3d 19, 27 (1st Cir. 2000) (*en banc*), *cert. denied*, 531 U.S. 961 (2000).

"[t]his Court has not defined the intent that a defendant must possess in order to violate the bank fraud statute" and went on to state that the disagreement among the circuits "concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss."[13]

### 2. The Second, Fourth, Fifth and Seventh Circuits Hold that 18 U.S.C. § 1344 Requires a Specific Intent to Harm a Bank

Although the lengthening battle lines that divide the circuits are still not clearly defined, the courts of appeals seem to be digging in along their diverging fronts. For example, the Solicitor General acknowledges that the Second, Fifth and Seventh Circuits are united in their belief that the government must prove that the defendant intended to expose the bank to an actual or potential loss of its own funds.[14] These circuit courts

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[13] Brief for Solicitor General in Opp. to Cert. at 7-8, *McNeil v. United States*, No. 02-10904 ("[t]here is some disagreement among the courts of appeals"); *see also* Brief of Solicitor General in Opp. to Cert. at 10, *Whitmore v. United States*, No. 02-126 ("the courts of appeals disagree on whether exposing or intending to expose a financial institution to a risk of loss is an element of bank fraud").

[14] Brief for Solicitor General in Opp. to Cert. at 8, *McNeil v. United States*, No. 02-10904, citing *United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998); *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); and *United States v. Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993). The Solicitor General also observed that the Fourth Circuit has held that exposing the bank to an "actual or potential risk of loss" is a required element of bank fraud. *United States v. Brandon*, 298 F.3d 307, 311-12 (4th Cir. 2002) ("a conviction under § 1344 is not supportable by evidence merely that some person other than a federally insured financial institution was defrauded in a way that happened to involve banking, without evidence that such an institution was an intended victim").

have remained faithful to the conventional reading of § 1344, in their firm belief that the bank fraud statute requires a specific intent to victimize a bank.[15]

### 3. The First, Sixth, Ninth, Tenth and Eleventh Circuits Hold that § 1344 Does Not Require Specific Intent to Harm a Bank

In contrast, the First, Sixth, Tenth and Eleventh Circuits have defected from the traditional notion of requiring the government to prove that a defendant intended to cause a bank any financial loss.[16] Instead, they hold that a defendant may be found guilty of bank fraud — and subjected to a sentence of up to 30 years

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[15] *See also United States v. Crisci*, 273 F.3d 235, 239-40 (2d Cir. 2001) (the government must prove that the defendant "possessed an intent to victimize the [financial] institution by exposing it to actual or potential loss" and that "a bank was an actual or intended victim of defendant's scheme"); *United States v. Lamarre*, 248 F.3d 642 (7th Cir. 2001), *cert. denied*, 533 U.S. 963 (2001) (a "bank fraud conviction requires proof that a defendant had the specific intent to defraud the bank"); *United States v. Lane*, 323 F.3d 568, 583 (7th Cir. 2003), *petition for cert. filed*, 71 U.S.L.W. 3759 (May 19, 2003) (No. 02-1725) (§ 1344 "requires the showing of an intent to deceive a bank in order to obtain from it money or other property").

[16] Brief for Solicitor General in Opp. to Cert. at 8, *McNeil v. United States*, No. 02-10904, citing *United States v. Kenrick*, 221 F.3d 19, 22, 29 (1st Cir. 2000) (*en banc*) ("intent to harm" is "not an element of bank fraud"), *cert. denied*, 531 U.S. 961 (2000); *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001), *cert. denied*, 123 S. Ct. 125 (2002); *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995), *cert. denied*, 516 U.S. 1082 (1996); and *United States v. De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002). *See also United States v. McNeil*, 320 F.3d 1034 (9th Cir. 2003), *petition for cert. filed* (May 22, 2003) (No. 02-10904). Because of ambiguities in the case law, it is difficult to classify each circuit's position. But, if anything, this adds weight to our argument that this Court's intervention is required to dispel the mounting confusion that is encircling the bank fraud statute.

incarceration — without any showing that he *intended* to harm the bank. Because of the constitutional consequences of the drastic approach adopted by the defecting circuits, Christopher Eric McNeil, from the Ninth Circuit, has also sought certiorari in a separate petition filed on May 22, 2003, on this very issue. *See McNeil v. United States*, No. 02-10904. McNeil's petition is scheduled to be acted upon on September 29, 2003.

**4. The Third Circuit is a "House Divided" on the Issue of What Specific Intent is Required Under the Bank Fraud Statute**

To further complicate matters, the United States Court of Appeals for the Third Circuit is, itself, a "house divided" on the proper interpretation of § 1344. In *United States v. Thomas*, 315 F.3d 190 (3d Cir. 2002), three members of that court, underscoring the "troublesome question concerning the correct construction of the federal bank fraud statute," concluded that "harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud." 315 F.3d at 193, 200. The panel went on to hold that § 1344 requires the specific intent to cause a bank "an actual or potential loss of its own funds." 315 F.3d at 206.

Thus, it appeared as though the Third Circuit had joined with the Second, Fourth, Fifth and Seventh Circuits in their view that § 1344 requires proof that the defendant intended to cause the bank some

financial risk.[17] Nevertheless, another panel of the court subsequently issued its decision in Petitioner's case, which is at odds with *Thomas* and has substantially added to the rising turmoil.

In *Khorozian*, the court held that § 1344's "specific intent requirement is satisfied if an individual *commits an act* that *could* put the bank at risk of loss" (App. 10) (emphasis supplied). This decision, which effectively reads out of § 1344 any requirement that the defendant *intended* to jeopardize the bank — and, instead, focuses on the defendant's *actions* rather than her *intent* — brings the Third Circuit more in line with the holdings of the First and Ninth Circuits, which do not require any intent to harm the bank.

There is simply no way to reconcile these two recent conflicting decisions from the Third Circuit. Although opposing precedent within a circuit, on its own, may not be sufficient to warrant review by this Court, such an inconsistency is certainly a compelling circumstance that has, in the past, justified a grant of certiorari. This is especially true where, as here, the intra-circuit conflict involves a recurring and volatile issue, which is accompanied by a widespread conflict among the other circuits.[18]

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[17] In fact, the Solicitor General counted the Third Circuit in the alignment of courts that require the government to prove an intent to expose the bank to an actual or potential loss. *See* Brief for Solicitor General in Opp. to Cert. at 8, *McNeil v. United States*, No. 02-10904.

[18] *See John Hancock Mutual Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari granted because of conflict within the Fifth Circuit and the importance of the question); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (limited grant of

### 5. The Growing Conflict in the Circuit Courts Over the Scope of the Bank Fraud Statute Desperately Needs to be Resolved

It is at once apparent that the courts of appeals throughout the country are in a deplorable state of disarray over the question involving what are the specific intent requirements of § 1344. At present, there is no presiding or prevailing view concerning the degree of intent required for bank fraud. Instead, there is only a disparate variety of rules fashioned by the competing circuit courts bearing on what § 1344 requires in the way of specific intent. Therefore, there is a pressing need for a uniform policy concerning the administration of the bank fraud statute, which will also satisfy the constitutional necessities of the Fifth Amendment's due process clause.

The magnitude of this issue is further accentuated by the realization that in 2002, *1,510 defendants* were charged with bank fraud in district courts throughout the United States.[19] The fact that § 1344 ranks among

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certiorari because of intra-circuit conflict resulting from precedent established "by a differently constituted court of the same Circuit"); *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (intra-circuit split in the Ninth Circuit noted as well as a conflict among the Circuits); *see also Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); Robert L. Stern & Eugene Gressman *et al.*, *Supreme Court Practice* § 4.6 (BNA Books 8th ed. 2002). Significantly, Rule 10(a) provides that certiorari may be granted where a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of this Court's supervisory power."

[19] Whereas, in 2002 there were only 1,586 mail fraud prosecutions. Table 5.24, *Sourcebook of Criminal Justice Statistics Online, 2002*, U.S. Department of Justice, Bureau of Justice Statistics, Washington, DC, available at *http://www.Albany.edu/sourcebook/1995/pdf/t524.pdf.*

one of the most highly mobilized criminal provisions utilized by prosecutors lends enormous force to the questions presented by this petition — and amplifies the need for uniformity in its enforcement.

### 6. Commentators Describe this Conflict over the Proper Construction of the Bank Fraud Statute as an Issue that is Ripe for Certiorari Review

Several leading commentators in the area of fraud prosecutions, including the former Chief of the Criminal Division of the United States Attorney's Office in New York, have underlined this crucial conflict by focusing on the clash between the Second, Third, Seventh and Ninth Circuits.[20] This conflict has even been described as *the* leading "white-collar crime issue" in the nation today and is bound to be a source of continuing controversy "in the current prosecutorial climate."[21] Put more bluntly, the reality that this issue involves one of the most dangerous and fiercely exploited statutory weapons in a federal prosecutor's armory emphasizes why certiorari is imperative.

Recognizing the importance of imposing order in the highly perilous sphere of federal fraud, this Court recently granted certiorari to resolve a conflict in the circuits relating to whether "materiality" is an element of a scheme to defraud under the bank, mail, and

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[20] *See* Elkan Abramowitz, *Issues Ripe for U.S. Supreme Court Review*, N.Y.L.J., Sept. 2, 2003, at 3. Mr. Abramowitz stresses that "[c]ourts have taken varying approaches to the question of how much of a nexus there must be between a federally insured bank and a fraudulent scheme to sustain a prosecution under the federal bank fraud statute."

[21] *Id.*

wire fraud statutes. In *Neder v. United States*, 527 U.S. 1, 7 (1999), this Court stabilized another divided and fragmented aspect of the law of bank fraud.[22] The same authoritative supervision is now needed for the troubling dispute regarding the specific intent requirements of § 1344, because here the disparity among the circuits is even more acute.[23] As with *Neder*, there is an urgent need for some measure of doctrinal certitude concerning the scope of the bank fraud statute in order to guide judges, prosecutors and defense lawyers in this prominent and rapidly expanding field of prosecution.

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[22] At the time *Neder* was considered by this Court, several circuit courts had issued conflicting decisions regarding materiality in fraud prosecutions. For example, the Eleventh Circuit was somewhat divided on the question of whether materiality is an element of federal fraud. *Compare United States v. Pitt*, 717 F.2d 1334, 1339 (11th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984) (omitting materiality as an element of wire fraud), with *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir. 1997) (including materiality as an element of bank fraud). In addition to that inter-circuit split, the Tenth Circuit concluded that although materiality is not an element of wire fraud, "there is a materiality aspect to the determination of whether the acts of an accused give rise to a scheme to defraud." *United States v. Cochran*, 109 F.3d 660, 668 n.3 (10th Cir. 1997). *See* John S. Slosson, *Neder v. United States - Materiality in Bank Fraud Prosecutions*, 4 N.C. Banking Inst. 655, 661 (April 2000).

[23] This Court also recently granted certiorari and was able to settle an equally divisive question regarding how and when a defendant may challenge trial counsel's effectiveness. *Massaro v. United States*, 123 S. Ct. 1690 (2003).

### 7. *This* is the Appropriate Case to Resolve the Conflicts Among the Circuits Concerning the Scope of the Bank Fraud Statute

Although the Solicitor General recognizes that this area of the law is in conflict, nevertheless, in several recent cases the Solicitor General's Office has argued that certiorari should be denied because the particular case was "not an appropriate vehicle for this Court to resolve the disagreement among the courts of appeals."[24]

We urge that this case *is* the appropriate "vehicle" for this Court to finally resolve this clear conflict among the circuits. First, the Solicitor General indicated its opposition to the Third Circuit's earlier holding that the government must prove that a defendant intended to expose the bank to an actual or potential loss.[25] Second, this case contains an ideal factual basis that provides a fair foundation to resolve the partisan views existing among the different courts of appeals. For example, Petitioner submitted checks to a bank without knowing they were counterfeit. However, even though there was absolutely no proof that Petitioner believed that this would cause the bank any loss,

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[24] In *McNeil*, the Solicitor General urges that review is not warranted because (1) the decision of the Ninth Circuit is correct; (2) the case does not involve the factual situation that has given rise to the disagreement among the courts of appeals; and (3) any defendant who engaged in the conduct in which that petitioner engaged would be subject to federal prosecution for wire fraud, even if he were not subject to prosecution for bank fraud, so the question of whether a bank fraud prosecution was viable under that factual situation is "not of general importance." Brief for Solicitor General in Opp. to Cert. at 9, *McNeil v. United States*, No. 02-10904.

[25] *See* Brief for Solicitor General in Opp. to Cert. at 8-9, *McNeil v. United States*, No. 02-10904, citing *United States v. Thomas*, 315 F.3d 190, 200 (3d Cir. 2002).

she still suffered the brutal sanctions of a bank fraud conviction merely because she *did* an act that "*could*" expose the bank to a risk of loss. But, in the Second or Seventh Circuits she would have been spared that conviction because she could not be found guilty of bank fraud without proof that she actually intended to defraud the bank by causing it harm.[26] In a nation that takes pride in its principles of equal protection of the law, this is constitutionally unacceptable.

Moreover, here the district court refused to instruct the jury that the government had to prove that Petitioner intended to victimize the bank by causing it an actual or potential loss of its funds. Finally, Petitioner was not subject to any other criminal provisions that would render a decision in this case moot. Therefore, this case does, indeed, present the proper vehicle for this Court's consideration, and is further facilitated by the pure nature of this important constitutional issue.

To summarize, the concerns expressed by the different courts both for and against a strict construction of the bank fraud statute have now been joined in this single case, which provides an appropriate platform for clarifying the intent requirements of § 1344. This case, more than any other, brings squarely into focus the conflict among the circuits and will enable the Court to decide the proper scope of the bank fraud statute.

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[26] The mere "act" of depositing the checks, standing alone, without proof that she intended to cause the bank any loss of its own funds, is now sufficient in the Third Circuit to fulfill the requirements of the bank fraud statute.

Without some uniform resolution concerning the application of § 1344, appellate review in bank fraud prosecutions will continue to proliferate as the battle lines that zigzag through the many different circuits become more deeply entrenched. It is an issue that will endure and will, undoubtedly, return to this Court again and again until it is finally resolved.

**8. Expanding the Reach of the Bank Fraud Statute to Cover Every Act that "Could" Put a Bank at Risk of Loss Creates Serious Jurisdictional Concerns**

Review of the *Khorozian* decision is also warranted because not only has the Third Circuit now further hardened the lines drawn between the circuits, but by eliminating the specific intent to defraud, customarily associated with all fraud statutes, the court has radically distorted the discreet jurisdictional reach of § 1344.[27] This, of course, presents a proposition of the highest importance and raises profound policy implications that will seriously affect the administration of the federal bank fraud statute.

A rule that imposes criminal liability on anyone who makes a false statement to a bank that "could" create a risk of loss is a woefully inadequate standard by which to judge the culpability of a person's actions.

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[27] The basic intuition underlying the bank fraud statute was to punish those frauds in which "the *victims* are financial institutions." S. Rep. No. 98-225, reprinted in 1984 U.S.C.C.A.N. 3182, 3517 (emphasis supplied). The statute is "primarily concerned with 'fraudulent schemes where banks are *victims*.'" H.R.Rep. No. 98-901 (1984) (emphasis supplied). Thus, it seems clear from the legislative history that the bank fraud statute is limited to those frauds which are perpetrated directly on financial institutions.

It bears repeating that since § 1344 is one of the most aggressively enforced of all criminal statutes, this overly expansive reading creates a compelling need for certiorari to ensure that the established jurisdictional boundaries of § 1344, fixed by Congress and endorsed by the Second, Fourth, Fifth and Seventh Circuits, remain intact.

Traditional notions of bank fraud require an actual intent to defraud — not the mere possibility of some potential risk occurring because misinformation may have been provided to the bank. Under § 1344, if the scheme itself does not have, as its underlying purpose, deprivation of the bank's funds or placing the bank at risk, there can be no bank fraud. Thus, the true jurisdictional dispensing element of bank fraud is the specific intent to cause the bank harm.[28]

This Court has never suggested that the harm or deprivation of property component, so essential to the "intent to defraud" element of the federal fraud statutes, can be enlarged to reach the limitless contingencies spawned by what "could" or might create a risk of loss to a protected institution.[29] Under the Third Circuit's

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[28] As properly noted by the Solicitor General, the "essence" of bank fraud is "the intent to defraud" and a person cannot commit that offense "without at least intending that his fraudulent scheme cause the victim to part with money, property, or some other interest." Brief for Solicitor General, *Neder v. United States*, No. 97-1985, available at 1999 WL 6660, *40.

[29] At the very heart of all federal fraud statutes is the requirement that the accused *intends*, in some way, to profit at the expense of the victim. In *Morissette v. United States*, 342 U.S. 246, 250-51 (1952), this Court observed that the "contention that an injury can amount to a crime only when inflicted by intention" is as "universal and persistent" as belief in "freedom of the human will" and a "duty of the normal individual to choose between good and evil." It has long

ruling, almost any misrepresentation made to a bank has the potential to put the bank at risk of loss. The use of the indefinite word "could," that ostensibly contemplates even a *possibility* of harm, enlarges the reach of § 1344 beyond anything imaginable. This elusive criteria cannot be substituted for the far more stringent and quantifiable measure that is constitutionally mandated in all federal fraud prosecutions.

Moreover, there is a dangerous power in ambiguity. The fatally vague standard of "could" extends the bank fraud statute far beyond all constitutional limits and is capable of criminalizing a wide variety of harmless misrepresentations frequently made in the busy banking world.[30]

Furthermore, there is a considerable difference between committing an act that "could" put a bank at a risk of loss, and intending to cause the bank an actual loss of its own funds. We urge that the framers of § 1344 never intended that a defendant, who does not contemplate some actual harm to a bank, may be subjected to a 30-year prison sentence for acts that might place a bank at risk, without any intent to actually do so. Thus,

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been recognized that "to constitute any crime there must first be a 'vicious will.'" *Id.* Even the most passing familiarity with statutory construction leads to the obvious conclusion that a specific criminal intent to harm the bank is absolutely essential for a violation of § 1344.

[30] In 2001, there were *600,085* reported incidents of some form of check fraud in banks throughout the country. American Bankers Association Deposit Account Fraud Survey Report, 2002, reported at *http://www.microbanker.com/artarchive02/030101AttemptedCheckFraud Doubles.html. See also Check Fraud is On the Rise*, The Plain Dealer, Dec. 2, 2002, available at 2002 WL 6385018. We assume that many of these instances may have involved persons who unwittingly deposited checks that turned out to be invalid.

it is imperative that the stronger level of criminal intent that historically has been an indispensable part of the bank fraud statute, be retained.[31]

It is worth remembering that the jurisdictional excesses regarding federal criminal statutes are of accretion.[32] And, policy considerations require that the gradually evolving process of infringement be halted at its early stages, before it goes too far. The stance taken by the Third Circuit, as well as its confederated circuits, is bound to have grave consequences for hundreds of citizens who may face conviction in one circuit but not in another. This is why the intervention of this Court is so badly needed. In a word, bank fraud must be the product of a culpable mind that intends to harm the bank. Without some uniform resolution concerning the application of § 1344, the growing confusion in this crucial area of the law will become intolerable. Finally, the force of the arguments in favor of keeping the reach of § 1344 within constitutional bounds, by

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[31] The Solicitor General has acknowledged that the distinct intent requirement embodied in the federal fraud statutes "effectively narrows the scope of deceptive conduct reached by the statute." Brief for Solicitor General, *Neder v. United States*, No. 97-1985, available at 1999 WL 6660, *43. Moreover, the deprivation of property requirement limits the scope of the fraud statutes to those "schemes that the defendant subjectively intends would defraud a victim, or would enable the defendant to *obtain money or property* from the victim by deceptive means." *Id.* at *44 (emphasis supplied). It seems that the government agrees that the conventional "intent to defraud" characterized by all fraud statutes is indispensable for maintaining the narrow scope of those laws.

[32] *See Cleveland v. United States*, 531 U.S. 12, 27 (2000) ("[a]bsent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States").

insisting upon a specific intent to cause a bank harm, are so fundamental and so humane that they cry out for certiorari.

## CONCLUSION

For all these reasons, Petitioner prays that a Writ of Certiorari issue to review the Third Circuit's opinion in this case.

Respectfully submitted,

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